

U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS	
FILED	
JUL 13 2010	
CLERK, U.S. DISTRICT COURT	
By	Deputy

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

4  
5 RICHARD MILLER, §  
6 §  
7 Plaintiff, §  
8 §  
9 v. §  
10 §  
11 RAYTHEON COMPANY, §  
12 §  
13 Defendant. §

CIVIL ACTION NO.  
3:09-CV-440-O (ECF)

14  
**CHARGE OF THE COURT**

15  
MEMBERS OF THE JURY:

16 You have heard the evidence in this case. I will now instruct you on the law that you  
17 must apply. It is your duty to follow the law as I give it to you. On the other hand, you, the jury,  
18 are the judges of the facts. Do not consider any statement that I have made in the course of trial  
19 or that I make in these instructions as an indication that I have any opinion about the facts of this  
20 case.

21 Throughout these instructions, I will refer to Plaintiff Richard Miller as "Mr. Miller" or  
22 "Plaintiff" and to Defendant Raytheon Company as "Raytheon" or "Defendant." In these  
23 instructions, when I refer to actions taken by Raytheon, I am actually referring to the conduct of  
24 the officers, employees, or agents of Raytheon. An act or omission of such a person is deemed  
25 by the law to be attributable to the corporation for which the person is acting.

26 After I instruct you on the law, the attorneys will have an opportunity to make their  
27 closing arguments. You are instructed that statements and arguments of the attorneys are not  
28 evidence and are not instructions on the law. They are intended only to assist you in  
29 understanding the evidence and the parties' contentions.

30 After the attorneys make their closing arguments, I will give you some additional  
31 instructions, after which you will retire to commence your deliberations. Answer each question  
32 from the facts as you find them. Do not decide who you think should win and then answer

33 accordingly. Your answers and your verdict must be unanimous.

34 **Equality of Parties**

35 Do not let bias, prejudice or sympathy play any part in your deliberations. You must  
36 make your decision based upon the facts of this case, and not let sympathy or emotion sway your  
37 decisions. The parties to this litigation, whether an individual, a corporation, or whatever their  
38 character, are equal before the law and must be treated as equals in a court of justice.

39 **Burden of Proof**

40 Unless I instruct you otherwise, you must answer all questions from a preponderance of  
41 the evidence. A "preponderance of the evidence" means the greater weight and degree of  
42 credible evidence before you. In other words, a preponderance of the evidence just means the  
43 amount of evidence that persuades you that a claim is more likely so than not so. In determining  
44 whether any fact has been proved by a preponderance of the evidence in the case, you may,  
45 unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have  
46 called them, and all exhibits received in evidence, regardless of who may have produced them.

47 In this case, and unless otherwise instructed, Mr. Miller must prove every essential part of  
48 his claim by a preponderance of the evidence. If the proof fails to establish any essential part of  
49 Mr. Miller's claim by a preponderance of the evidence, you should find for Raytheon as to that  
50 claim. Similarly, Raytheon must prove every essential part of its affirmative defense of failure to  
51 mitigate damages by a preponderance of the evidence. If the proof fails to establish any essential  
52 part of Raytheon's affirmative defense by a preponderance of the evidence, you should find for  
53 Mr. Miller as to that affirmative defense.

54 You may have heard of the phrase "proof beyond a reasonable doubt." That is a stricter  
55 standard that applies in criminal cases. It does not apply in civil cases such as this. You should  
56 therefore put it out of your minds.

57 **Credibility of Witnesses**

58 In determining the weight to give to the testimony of a witness, you should ask yourself  
59 whether there was evidence tending to prove that the witness testified falsely concerning some  
60 important fact, or whether there was evidence that at some other time the witness said or did  
61 something, or failed to say or do something, that was different from the testimony the witness

62 gave before you during the trial.

63 You should keep in mind, of course, that a simple mistake by a witness does not  
64 necessarily mean that the witness was not telling the truth as he or she remembered it, because  
65 people may forget some things or remember other things inaccurately. So, if a witness has made  
66 a misstatement, you need to consider whether that misstatement was an intentional falsehood or  
67 simply an innocent lapse of memory; and the significance of that may depend on whether it has  
68 to do with an important fact or with only an unimportant detail.

69 **Evidence and Inferences**

70 While you should consider only the evidence in this case, you are permitted to draw such  
71 reasonable inferences from the testimony and exhibits as you feel are justified in the light of  
72 common experience. In other words, you may make deductions and reach conclusions that  
73 reason and common sense lead you to draw from the facts that have been established by the  
74 testimony and evidence in the case.

75 The testimony of a single witness may be sufficient to prove any fact, even if a greater  
76 number of witnesses may have testified to the contrary, if after considering all the other evidence  
77 you believe that single witness.

78 There are two types of evidence that you may consider in properly finding the truth as to  
79 the facts in the case. One is direct evidence-such as testimony of an eyewitness. The other is  
80 indirect, or circumstantial, evidence the proof of a chain of circumstances that indicates the  
81 existence or nonexistence of certain other facts. As a general rule, the law makes no distinction  
82 between direct and circumstantial evidence, but simply requires that you find the facts from a  
83 preponderance of all the evidence, both direct and circumstantial.

84 You have heard evidence that the EEOC issued Mr. Miller a dismissal and notice of right  
85 to sue letter in this case. You are instructed that this action of the EEOC is not determinative, but  
86 rather, it is your job to decide the age discrimination questions in this case.

87 **Expert Witnesses**

88 When knowledge of technical subject matter may be helpful to the jury, a person who has  
89 special training or experience in that technical field is permitted to state his opinion on those  
90 technical matters. He or she is called an expert witness. However, you are not required to accept

91 that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

92 **Testimony by Deposition**

93 Certain testimony has been presented to you through depositions. A deposition is the  
94 sworn, recorded answers to questions asked a witness in advance of the trial, by attorneys  
95 representing the parties in this case. These witnesses were questioned under oath, and a court  
96 reporter was present and recorded the testimony. The questions and answers were read to you or  
97 played for you by video throughout this trial. Deposition testimony is entitled to the same  
98 consideration, and is to be judged by you as to credibility, as if the witnesses had been present  
99 and had testified from the witness stand in court.

100 **Stipulations of the Parties**

101 The parties have agreed, or stipulated, that:

102 1. Raytheon employed more than 500 people in more than 20  
103 calendar weeks in each year from 2008 to 2010.

104 2. Raytheon is an "employer" within the meaning of 29 U.S.C. §  
105 630(b) and TEX. LAB. CODE § 21.002(8).

106 This means that both sides agree that these are facts. You must therefore treat these facts as  
107 having been proved.

108 **Contentions of the Parties**

109 The Court sets forth the contentions of the parties to aid you in understanding the nature  
110 of Plaintiff's claims and the defenses asserted by Defendant. These are strictly the parties'  
111 respective positions. As members of the jury, you will decide the facts of this case.

112 Plaintiff's Contentions

113 Plaintiff contends that Defendant discriminated against him because of his age in  
114 violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, and  
115 in violation of the Texas Commission on Human Rights Act ("TCHRA"), TEX. LABOR CODE §  
116 21.001, *et seq.* Specifically, Mr. Miller contends that in March 2008 Raytheon selected him for  
117 inclusion in a reduction in force because of his age. Mr. Miller seeks compensatory damages and  
118 punitive damages.

119 Defendant's Contentions

120       Defendant denies Plaintiff's claims. Raytheon contends that Mr. Miller was terminated in the  
121       reduction in force for nondiscriminatory reasons.

122       **ADEA Age Discrimination Claim**

123       The Age Discrimination in Employment Act of 1967 (ADEA), as amended, is a federal  
124       law that prohibits discrimination in employment against individuals 40 years of age and older.  
125       The ADEA prohibits discrimination because of age with respect to any term, condition, or  
126       privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job  
127       assignments, and training. The ADEA applies to employers with 20 or more employees.

128       Under the ADEA, it is "unlawful for an employer to discharge any individual or  
129       otherwise discriminate against any individual with respect to his compensation, terms,  
130       conditions, or privileges of employment, because of such individual's age." 28 U.S.C. § 623  
131       (a)(1).

132       To succeed under the ADEA, Plaintiff must establish that discrimination was the but-for  
133       cause of Defendant's decision to discharge him. If you disbelieve the reason(s) Defendant has  
134       given for its decision, you may infer it discharged Plaintiff because of his age.

135       The ADEA prevents discrimination on the basis of age, not salary or seniority. Therefore,  
136       an employer's decision to terminate older employees to cut costs and prevent the vesting of  
137       pension benefits, standing alone, is insufficient to prove age discrimination. Employers are free  
138       under the law to use their judgment, whether you agree with it or not, so long as decisions are not  
139       made because of an individual's age.

140       **TCHRA Age Discrimination Claim**

141       The Texas Commission on Human Rights Act ("TCHRA") is a state law that prohibits  
142       discrimination in employment against individuals 40 years of age and older. The TCHRA  
143       prohibits discrimination based on age with respect to any term, condition, or privilege of  
144       employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments,  
145       and training. The TCHRA applies to employers with 20 or more employees.

146       Under the TCHRA, an "employer commits an unlawful employment practice if because  
147       of . . . age the employer . . . discharges an individual, or discriminates in any other manner against  
148       an individual in connection with compensation or the terms, conditions, or privileges of  
149       employment." TEX. LABOR CODE § 21.051.

150       The TCHRA prevents discrimination on the basis of age, not salary or seniority.  
151       Therefore, an employer's decision to terminate older employees to cut costs and prevent the  
152       vesting of pension benefits, standing alone, is insufficient to prove age discrimination.  
153       Employers are free under the law to use their judgment, whether you agree with it or not, so long  
154       as decisions are not made because of an individual's age.

155       If you disbelieve the reason(s) Defendant has given for its decision, you may infer it  
156       discharged Plaintiff because of his age.

157       **Question No. 1: Did Defendant discharge Plaintiff because of his age, in violation of the**  
158       **ADEA?**

159       Instruction:

160       To prove discrimination under the ADEA, Plaintiff must prove by a  
161       preponderance of the evidence that Defendant discharged him because of  
162       his age.

163       **Answer "Yes" or "No":** Yes

164       If you answered "Yes" to Question No. 1, then please proceed to Question No. 2.  
165       If you answered "No" to Question No. 1, then please proceed to Question No. 3.

166       **Question No. 2: Was Defendant's discharge in violation of the ADEA of Plaintiff "willful"?**

167       Instructions:

168       If you find that Raytheon terminated Mr. Miller because of his age, in  
169       violation of the ADEA, then you must also determine whether Raytheon's  
170       actions were "willful."

171       To establish willfulness, Plaintiff must also prove that, when Defendant  
172       discharged Plaintiff, Defendant either:

173               (a) knew that its conduct violated the ADEA, or  
174               (b) acted with reckless disregard for compliance with the ADEA.

175       **Answer "Yes" or "No":** Yes

176

Please proceed to Question No. 3.

177

**Question No. 3: Did Defendant discharge Plaintiff because of his age, in violation of the TCHRA?**

178

Instructions:

180

To prove discrimination under the TCHRA, Plaintiff must prove by a preponderance of the evidence that Defendant discharged him because of his age.

183

To meet his burden under the TCHRA, Plaintiff must establish that age was a “motivating factor” in Defendant’s decision to discharge him.

185

186

187

A “motivating factor” in an employment decision is a reason for making the decision at the time it was made. There may be more than one motivating factor for an employment decision.

188

Answer “Yes” or “No”: Yes

189

If you answered “No” to Question No. 1 and you also answered “No” to Question No. 3, then you are finished. The Foreperson should sign on the space provided on the last page of this charge and then alert the court security officer that you have reached a verdict.

190

If you answered “Yes” to Question No. 3, please proceed to Question No. 4.

193

**Question No. 4: Would Defendant have taken the same action inquired about in Question No. 3 when it did, in the absence of the impermissible motivating factor?**

195

Instruction:

196

On this question, Defendant has the burden of proof by a preponderance of the evidence.

197

Answer “Yes” or “No”: No

200

If you answered “No” to Question No. 1 and you also answered “Yes” to Question No. 4, then you are finished. The Foreperson should sign on the space provided on the last page of this charge and then alert the court security officer that you have reached a verdict.

204

Otherwise, please proceed to the “Damages” section.

205

**Damages**

206

If you found that Defendant violated the ADEA and/or the TCHRA, then you must determine whether Defendant has caused Plaintiff damages and, if so, you must determine the amount, if any, that is fair compensation for those damages. These

209 damages are called compensatory damages.

210 If you found that Defendant violated the TCHRA, then you also will be asked to  
211 determine if Raytheon is liable for punitive damages and, if so, you will be asked to fix  
212 the amount of those damages. Because the method of determining punitive damages and  
213 compensatory damages differ, I will instruct you separately on punitive damages. The  
214 instructions I now give you apply only to your award, if any, of compensatory damages.

215 **Compensatory Damages**

216 The purpose of compensatory damages is to make the plaintiff whole—that is, to  
217 compensate Plaintiff for the damage that he has suffered. You may award  
218 compensatory damages only for injuries that Plaintiff proves, by a preponderance of the  
219 evidence, were proximately caused by Defendant's allegedly wrongful conduct. The  
220 damages that you award must be fair compensation for all of Plaintiff's damages, no more  
221 and no less. Compensatory damages are not allowed as a punishment and cannot be  
222 imposed or increased to penalize the defendant.

223 If you decide to award compensatory damages, you should be guided by  
224 dispassionate common sense. Computing damages may be difficult, but you must not let  
225 that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does  
226 not require that the plaintiff prove the amount of his losses with mathematical precision,  
227 but only with as much definiteness and accuracy as the circumstances permit.

228 You must use sound discretion in fixing an award of damages, drawing reasonable  
229 inferences where you find them appropriate from the facts and circumstances in evidence.

230 You should consider the following elements of compensatory damages, to the  
231 extent you find them proved by a preponderance of the evidence: (1) economic loss,  
232 which includes back pay and benefits; and (2) non-economic loss, which includes  
233 emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and  
234 other nonpecuniary losses.

235 You should not award compensatory damages for speculative injuries. Rather, as  
236 to compensatory damages for economic loss, you may only award damages for those  
237 injuries which Plaintiff has actually suffered, if any. In the case of compensatory

238 damages for non-economic loss, such as mental anguish, you may only award damages  
 239 for those injuries which Plaintiff has actually suffered or is reasonably likely to suffer in  
 240 the future, if any.

241 Economic Loss/Back Pay and Benefits

242 Back pay and benefits include the amounts the evidence shows Plaintiff would  
 243 have earned had he remained an employee of Defendant, and includes fringe benefits  
 244 such as life and health insurance, contributions to retirement, etc., minus the amounts of  
 245 earnings and benefits, if any, Defendant proves by a preponderance of the evidence  
 246 Plaintiff received in the interim. You may award an amount that will fairly compensate  
 247 Plaintiff for any damages that he has suffered to date. You should separately consider  
 248 Plaintiff's past pension benefits from his back pay and other past benefits.

249 Defendant asserts an affirmative defense that Plaintiff failed to mitigate his  
 250 damages. To prevail on this defense, Defendant must show, by a preponderance of the  
 251 evidence, that: (a) there were "substantially equivalent employment" positions available;  
 252 (b) Plaintiff failed to use reasonable diligence in seeking those positions; and (c) the  
 253 amount by which Plaintiff's damages were increased by his failure to take such reasonable  
 254 actions.

255 "Substantially equivalent employment" means a job that has virtually identical  
 256 promotional opportunities, compensation, job responsibilities, working conditions, and  
 257 status as the job he lost. Plaintiff does not have to accept a job that is dissimilar to the one  
 258 he lost, one that would be a demotion, or one that would be demeaning. The  
 259 reasonableness of Plaintiff's diligence should be evaluated in light of the individual  
 260 characteristics of Plaintiff and the job market.

261 Any amount you award Plaintiff in back pay must be based solely on Mr. Miller's  
 262 earnings history. Mrs. Miller's earnings should not be considered in your calculations in  
 263 any manner.

264 Non-economic Loss/Mental Anguish

265 Plaintiff alleges that as a result of Defendant's actions, he has suffered damages in  
 266 the form of physical pain and mental anguish. You may award damages for any physical

267 pain or mental anguish that Plaintiff proves he has experienced in the past or will  
268 experience in the future as a result of Defendant's conduct.

269 Mr. Miller has the burden of proving any compensatory damages, including  
270 mental anguish, by a preponderance of the evidence. "Mental anguish" is more than mere  
271 disappointment, anger, resentment or embarrassment, although it may include all of these.  
272 No evidence of the value of intangible things, such as mental or physical pain and  
273 suffering, has been or need be introduced. You are not trying to determine value, but an  
274 amount that will fairly compensate Plaintiff for the damages, if any, he has suffered.

275 There is no exact standard for fixing the compensation to be awarded for these  
276 elements of damage. Any award that you make should be fair in the light of the evidence.  
277 You should consider the nature, character, and seriousness of any pain or mental anguish  
278 that you determine was caused by Defendant, and you must also consider its extent or  
279 duration. You should not award compensatory damages for speculative injuries, but only  
280 for those injuries which Plaintiff has shown that he has actually suffered or is reasonably  
281 likely to suffer in the future.

282 **Question No. 5: What sum of money, if paid now in cash, would fairly and**  
283 **reasonably compensate Plaintiff for the damages, if any, you have found Defendant**  
284 **caused Plaintiff?**

285 **Answer in dollars and cents for the following items and none other:**

286 (A) Back pay and benefits (excluding pension benefits): \$352,179.00

287 (B) Past pension benefits: \$227,000.00

288 (C) (B) Mental anguish: \$1,000,000.00

289 290 If you answered "Yes" to Question No. 3 and you also answered "No" to Question  
291 No. 4, then please proceed to "Punitive Damages under the TCHRA".

292 293 Otherwise, you are finished. The Foreperson should sign on the space provided  
294 on the last page of this charge and then alert the court security officer that you have  
reached a verdict.

295 **Punitive Damages under the TCHRA**

296 Punitive damages are those damages designed to punish a defendant and to deter a

297 defendant and others from engaging in similar conduct in the future.

298 If you find that Defendant is liable for Plaintiff's injuries, you must award the  
299 Plaintiff the compensatory damages that he has proven, as addressed earlier in this  
300 charge. In addition, you may award punitive damages under the TCHRA if you find that  
301 Plaintiff has proven by clear and convincing evidence that Defendant acted with malice or  
302 willfulness in its actions regarding Plaintiff or with reckless indifference to the right of  
303 Plaintiff to be free from discriminatory practices.

304 "Clear and convincing evidence" means the measure or degree of proof that  
305 produces a firm belief or conviction of the truth of the allegations sought to be  
306 established.

307 "Malice" means a specific intent by Defendant to cause substantial harm to  
308 Plaintiff.

309 One acts willfully or with reckless indifference to the rights of others when he acts  
310 in disregard of a high and excessive degree of danger about which he knows or which  
311 would be apparent to a reasonable person in his condition.

312 In making any award of punitive damages under the TCHRA, you should consider  
313 the nature of the wrong, the character of the conduct involved, the degree of culpability of  
314 Defendant, the situation and sensibilities of the parties concerned, the extent to which  
315 such conduct offends a public sense of justice and propriety, and the net worth of  
316 Defendant.

317 You may not award punitive damages if you find that Defendant acted in good  
318 faith in efforts it made trying to prevent its managers from violating the law prohibiting  
319 age discrimination.

320 **Question No. 6: Do you find by clear and convincing evidence that Defendant**  
321 **terminated Plaintiff's employment with malice or reckless indifference to his rights**  
322 **under the TCHRA?**

323 Answer "Yes" or "No": YES

324                   If you answered "Yes" to Question No. 6, then please proceed to Question No. 7.

325                   If you answered "No" to Question No. 6, then you are finished. The Foreperson  
326                   should sign on the space provided on the last page of this charge and then alert the court  
327                   security officer that you have reached a verdict.

328                   **Question No. 7: What sum of money, if any, if paid now in cash, should be assessed**  
329                   **against Defendant and awarded to Plaintiff as punitive damages, if any, for the**  
330                   **conduct referenced in Question No. 6?**

332                   Answer in dollars and cents, or answer "none": \$15,000, 000<sup>00</sup>

333

334                   You are finished. The Foreperson should sign on the space provided on the last  
335                   page of this charge and then alert the court security officer that you have reached a  
336                   verdict.

337

## INSTRUCTIONS ON JURY DELIBERATIONS

338                   The fact that I have given you in this charge instructions about a particular claim  
339                   or defense, or that I have not so instructed you, should not be interpreted in any way as an  
340                   indication that I believe a particular party should, or should not, win this case.

341                   After I finish reading this charge, you will retire to the jury room. I will send you  
342                   this charge and the exhibits that have been admitted into evidence. You will first select  
343                   one member of the jury to act as your Foreperson. The Foreperson will preside over your  
344                   deliberations and will speak on your behalf here in court.

345                   Do not deliberate unless all members of the jury are present in the jury room. In  
346                   other words, if one or more of you go to lunch together or are together outside the jury  
347                   room, do not discuss the case.

348                   In order to return a verdict your verdict must be unanimous. It is your sworn duty  
349                   as jurors to consult one another and to deliberate in an effort to reach an agreement if you  
350                   can do so. Each of you must decide the case for yourself, but only after an impartial  
351                   consideration with each other of all the evidence in the case. In the course of your  
352                   deliberations, do not hesitate to reexamine your own view and change your opinion if you  
353                   become convinced that you are wrong. Do not, however, surrender your honest  
354                   conviction as to the weight or effect of the evidence solely because others think  
355                   differently, or merely to finish the case. Remember at all times that you are not partisans.  
356                   You are judges—judges of the facts. Your sole interest is to seek the truth from the  
357                   evidence in the case.

358                   If, during your deliberations, you desire to communicate with me, your Foreperson  
359                   will reduce your message or question to writing, sign it, and pass the note to the court  
360                   security officer, who will bring it to my attention. I will then respond as promptly as  
361                   possible, either in writing or by asking you to return to the courtroom so that I can address  
362                   you orally. I will always first show the attorneys your question and my response before I  
363                   answer your question. If you do send a message or ask a question in which you indicate  
364                   that you are divided, never state or specify your numerical division at the time.

When you have reached unanimous agreement as to your verdict, the Foreperson shall fill in your answers to the questions on a copy of the charge that I will provide to you for this purpose, shall date and sign the last page of that copy of the charge, and shall notify the court security officer that you have reached a verdict. The court security officer will then deliver the verdict to me.

After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so.

The court will honor the schedule you set for your deliberations and your requests for breaks during your deliberations. From time to time I may communicate with you concerning your schedule. This is done primarily for the purpose of anticipating the court's staffing needs, and is not in any way intended to suggest that your deliberations should be conducted at a different pace or on a different schedule.

You may now retire to the jury room to conduct your deliberations.

## United States District Judge

### **Certification of Jury Verdict**

The foregoing is the unanimous verdict of the jury.

Dated: 7/13/10

Foreperson

Printed Name of Foreperson